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No. 73-492

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

KUNSTSAMMLUNGEN ZU WEIMAR,

Petitioner,

—against—

FEDERAL REPUBLIC OF GERMANY, EDWARD I. ELICOFON and ELISABETH MATHILDE ISIDORE ERBGROSSHERZOGIN VON SACHSEN-WEIMAR-EISENACH (Grand Duchess of Saxony-Weimar),

Respondents.

SUPPLEMENTAL BRIEF FOR PETITIONER

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Petitioner, Kunstsammlungen zu Weimar, respectfully submits this supplemental brief to call to the Court's attention the occurrence of events subsequent to the filing of its petition for a writ of certiorari which imply recognition of the German Democratic Republic by the United States.

It is undisputed that the decisions below were grounded solely on the nonrecognition of the GDR government; had recognition occurred prior to those decisions, Kunstsammlungen undoubtedly would have been permitted to sue. Further, where an unrecognized government (or, as here, an alleged instrumentality of the unrecognized government) has been denied access to our courts, its subsequent recognition by the executive at any stage of the appellate process cures its alleged incapacity to sue. *Republic of China* v.

Merchants' Fire Assur. Corp., 30 F.2d 278 (9th Cir. 1929); Restatement (Second), Foreign Relations Law § 107, Reporters' Note (1965).*

It is most significant therefore that developments which have occurred since the filing of our petition for certiorari strongly suggest recognition of the GDR by the United States. And this Court can and should take judicial notice of that recognition. *Republic of China* v. *Merchants' Fire Assur. Corp., supra;* cf. *United States* v. *Belmont,* 301 U.S. 324 (1937).

On September 18, 1973, the GDR and the Federal Republic of Germany were admitted to membership in the United Nations (N.Y. Times, September 19, 1973, at 1, col. 3). The United States government, having earlier joined in a quadripartite declaration of the Allied Powers pledging support for admission of the two German States and in the unanimous decision of the Security Council recommending their admission, now voted in favor of their acceptance as full-fledged members. These acts, we submit, constitute implied recognition of the GDR by our government.

Recognition is, of course, most frequently evidenced by formal declaration. But an express announcement is by no

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* This result is consistent with the long established principle that recognition retroacts to validate the acts of an existing although unrecognized foreign government [see, *e.g.*, *Oetjen* v. *Central Leather Co.*, 246 U.S. 297 (1918); *Underhill* v. *Hernandez,* 168 U.S. 250 (1897); *Luther* v. *Sagor* [1921] 3 K.B. 532; *Steingut* v. *Guaranty Trust Co. of New York,* 58 F.Supp. 623 (S.D.N.Y. 1944), *modified in part on other grounds, aff'd in part,* 161 F.2d 571 (2d Cir. 1947), *cert. dismissed,* 332 U.S. 753 (1947), *cert. denied,* 332 U.S. 807 (1947); Restatement (Second), Foreign Relations Law § 114 (1965)], including the commencement of an action prior to recognition [*State of Yucatan* v. *Argumedo,* 92 Misc. 547, 554 (Sup. Ct. N.Y. Co. 1915); see also, *Government of Mexico* v. *Fernandez* (1923), an unreported decision of the Supreme Court of Essex County, Massachusetts, discussed in Wright, *Suits Brought by Foreign States with Unrecognized Governments,* 17 Am. J. Int'l L. 742, 743-44 (1923)].

means essential. Recognition may also be implied, as Hackworth states, from any acts which manifest the intention to treat with the new state or government as such. 1 Hackworth, *Digest of International Law* 166 (1940). Implied recognition is, of course, a concept not new to the courts. *Republic of China* v. *Merchants' Fire Assur. Corp., supra; Government of Mexico* v. *Fernandez* (1923), unreported decision of the Supreme Court of Essex County, Massachusetts, discussed in Wright, *Suits Brought by Foreign States with Unrecognized Governments,* 17 Am. J. Int'l L. 742, 743-44 (1923); Restatement (Second), Foreign Relations Law § 104, Comment b (1965).

Article 4 of the United Nations Charter limits membership to "states". In sponsoring and voting in favor of the GDR's admission, therefore, our executive manifested an intention to accept the GDR as an entity possessing the requisite characteristics of statehood. And in approving the credentials of the GDR's delegation to the United Nations, he accepted the legitimacy of the government which had appointed that delegation.* See Restatement (Second), Foreign Relations Law § 105, Comment b (1965). Similarly, when Canada voted for the admission of Israel to the United Nations, it regarded that act "as having implied full recognition by the Government of Canada of the State of Israel". See Israeli Foreign Office letter, FO/I/(60), November 18, 1949.

Indeed, it has been suggested that admission to the United Nations *in itself* constitutes a collective recognition of the admitted state, binding upon all members: "... [T]he decision by which the General Assembly upon recommenda-

* Moreover, "[r]ecognition of new states usually carries with it recognition of the government of the state so recognized, since states can speak and act only through their governments". 1 Hackworth, *Digest of International Law* 167 (1940).

tion of the Security Council admits a community to membership in the Organization implies the recognition of this community as a state and . . . by ratifying the Charter or adhering to it in joining the Organization, a state transfers this competence to recognize a community as a state upon the Organization." Kelsen, *The Law of the United Nations* 79 (1950). See also, *U.S.S.R.* v. *Luxembourg and Saar Co.*, Ann. Dig., 1935-37, Case No. 33 (where a Luxembourg court held that nation committed to recognition of the Soviet government by reason of its admission to the League of Nations even though the Luxembourg delegate had not voted on the issue); Graham, *The League of Nations and the Recognition of States* 39-41 (1933); but see Restatement (Second), Foreign Relations Law § 105, Comment a (1965).

Our executive's intention to recognize the GDR was further underscored by the statement made, on the occasion of its admission to the United Nations, by our ambassador to that organization (a copy of which is annexed to this Brief). Ambassador Scali declared that the entry of "the two German states" into the United Nations was "a great symbolic act" and that the United States was "proud of the role which it has played in making this event a reality". Noting "with appreciation the declaration of the German Democratic Republic of its intention to abide by the principles of the United Nations Charter and to make its full contribution toward alleviating the world's economic, social and humanitarian ills", he expressed the hope that "the German Democratic Republic which occupies part of the territory of the former German Reich, will . . . recognize the just claims of those who suffered as a result of the actions of the Nazi government" and, together with the Federal Republic of Germany, join with the other member nations to resolve the world's pressing problems.

It would be difficult to conceive of a clearer expression of the intention to treat with the GDR as a sovereign in the community of nations. Were that not our government's purpose, it would have been a simple matter specifically to note that our government's votes in the United Nations and the Ambassador's statement should not be deemed to constitute recognition. Such reservations have often been utilized to avert any possible misconstruction of executive action in such situations. See, *e.g.*, 1 Hackworth, *Digest of International Law* 167, 348 (1940); Restatement (Second), Foreign Relations Law § 104, Reporters' Note (1965).

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We respectfully suggest that in these circumstances, the Court should grant Kunstsammlungen's petition for certiorari and follow one of two courses. The Court may choose to review the decision below; in that event, we believe that reversal would be appropriate since the implied recognition of the GDR has now cured any incapacity of Kunstsammlungen to sue. Or the Court may wish instead to vacate the judgment of the court of appeals and remand for reconsideration in light of the intervening recognition.

This latter course was recently taken in *First National City Bank* v. *Banco Nacional de Cuba*, 400 U.S. 1019 (1971). There, because of a letter from the Department of State received after the petition was filed, the Court granted the writ, vacated the judgment of the court of appeals and remanded for reconsideration without expressing any views on the merits of the case. Such a disposition seems appropriate here as well. It would comport not only with the rule that recognition during the pendency of the appeal cures any prior incapacity to sue, but also with the Court's policy to avoid decision on delicate questions of constitutional and international law where reasonable alternatives to decision exist. See, *e.g.*, *Kovacs* v. *Brewer*, 356 U.S. 604

(1958); *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450 (1945).*

For the foregoing reasons, we respectfully urge that the petition for certiorari should be granted and the judgment of the court of appeals vacated.

Respectfully submitted,

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October, 1973

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* It is important to resolve the question of Kunstsammlungen's capacity to sue in the pending case rather than in a newly commenced action (or on a new motion to intervene). For, it may be suggested that in a new action or on a new motion, Kunstsammlungen would be barred, notwithstanding recognition of the GDR, by the statute of limitations. Judge Rifkind's decision in *Steingut* v. *Guaranty Trust Co. of New York*, 58 F. Supp. 623, 637 (S.D. N.Y. 1944), *modified in part on other grounds, aff'd in part*, 161 F.2d 571 (2d Cir. 1947), *cert. dismissed*, 332 U.S. 753 (1947), *cert. denied*, 332 U.S. 807 (1947), we believe, establishes that any statute of limitations is tolled during the period of nonrecognition in circumstances such as those here; although the earlier decision in *Union of Soviet Socialist Republics* v. *National City Bank of New York*, 41 F. Supp. 353 (S.D.N.Y. 1941), suggests a contrary result (erroneously, in our view, and in any event in circumstances different from ours). Nevertheless, confirmation of Kunstsammlungen's right to sue in the framework of the pending case would eliminate any statute of limitations problem.

Appendix

UNITED STATES DELEGATION
TO THE UNITED NATIONS

FOR IMMEDIATE RELEASE

Press Release USUN 83 (73)
September 18, 1973

Statement by Ambassador John Scali, United States Representative to the United Nations, in Plenary, on the admission to membership in the United Nations of the German Democratic Republic , the Federal Republic of Germany, and the Bahamas, September 18, 1973.

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Mr. President, may I offer my warm congratulations and those of the United States as you, the distinguished representative of a respected neighbor, assume the Presidency of this 28th General Assembly. It is a special honor for me to speak as the representative of the host country at this moment in history. Three new members have taken their places today in the supreme parliament of mankind. One of them is a small country, particularly meaningful to us because it is a neighbor and a good neighbor. The entry of the two German states is the culmination of a generation of diplomacy, both inside and outside the United Nations, a process in which all parties have come to recognize the realities of today's world. It has been a process in which step by step the world has recognized that neither ideological conflicts, bitter memories, or war-bred jealousies can be allowed to obstruct the building of a better future.

By welcoming new members, we have moved only part way on the road to enduring peace but, accompanied as it is by other moves toward international harmony, it is a move that should cause mankind to take heart and satisfaction.

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We welcome the independent Bahamas to the United Nations with particular affection. This newest American republic is a close neighbor with whom we have much history in common. Like us, the Bahamas have a freely elected and representative government, the head of which, in the person of Prime Minister Pindling, is here among us today. We had been friends many years. The American Government has been represented in Nassau since 1821. We look forward to continuing these close ties with the Bahamas bilaterally and within this organization.

The entry of the two German states into the United Nations is a great symbolic act. The United Nations has grown over the years from its original 51 members to 135. But it was not until today that it could be said to even approach its goal of universality.

The entry of the two German states moves the United Nations much nearer to this goal, enhancing its ability to function in the real world where real decisions are made and executed.

The United States is proud of the role which it has played in making this event a reality. Beginning in 1969, President Nixon laid out a new blueprint for peace designed to replace conflict and confrontation with negotiation. His program was far more than atmospherics. He has since 1969 amply demonstrated his resolution to deal vigorously and forthrightly with the most difficult issues of our time and to lessen the threat of nuclear arms in a historic agreement with the Soviet Union. In Europe, the search for peace has meant seeking improvements in the Berlin situation, altering the nature of relations between East and West, reducing the military confrontation of opposing coalitions and lowering the barriers to travel, cultural and intellectual intercourse. It has also meant moving with careful steps toward normalizing diplomatic relations with the People's Republic of China and other nations.

The progress through careful negotiation is not and cannot be the work of one country or even a small group of countries. We are working with the Soviet Union in full concert with our allies to settle the differences of decades and reduce tensions in Central Europe.

A cornerstone of these efforts has been the Quadripartite Berlin Agreement, a document which shows what can be accomplished when there is readiness to reject the outworn ideological positions and search for ways to solve the stubborn problems. The Berlin Agreement demonstrates anew that even the most rigid deadlock can be resolved through patient negotiations and mutual accommodation.

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This agreement in turn was followed by the quadripartite declaration of November 1972 in which all four powers agreed to support UN membership for the two German States. Today, we have witnessed one of the fruits of those agreements.

Throughout this process, the Federal Republic of Germany has played a major and constructive role. Its policies have helped lay the groundwork for today's event. It has taken and is continuing to take imaginative and forward-looking steps to place this relationship with the Soviet Union over Eastern European countries and the German Democratic Republic on a sound and stable basis. The Federal Republic is, moreover, taking these steps in full consonance with its responsibilities for the maintenance of peace, stability and security in the European continent.

The Federal Republic of Germany is no stranger to the United Nations. It has played a substantial, indeed, often leading role in the specialized agencies of this body. Its contributions have already brought great benefit to mankind. Now with its full participation, the entire world community stands to benefit.

We have also noted with appreciation the declaration of the German Democratic Republic of its intention to abide by the principles of the United Nations Charter and to make its full contribution toward alleviating the world's economic, social and humanitarian ills.

In this connection, it is the particular hope of the United States that the German Democratic Republic which occupies part of the territory of the former German Reich, will also recognize the just claims of those who suffered as a result of the actions of the Nazi government. The Federal Republic of Germany, for its part, took exemplary and commendable measures in this regard many years ago.

The economic, technical, scientific, cultural and spiritual contributions of the German people have justly attracted wide admiration and greatly enriched the world. Today, we look forward to their full and effective participation in the immense international economic and social tasks facing the United Nations. The effort to improve the condition of man is not a task for only a few. It is a burden all nations must bear. Disease, hunger, human misery, pollution, and natural catastrophy oppress us all. The earth, air and sea are a common heritage and a common concern. The tools of science, technology, and education, which the German people are so eminently qualified to provide will be used to benefit every nation With the help of the two German states, this world body will be better able to meet mankind's pressing problems. This is a day of great pride for the peoples of the world.

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The generation which fought World War II is reassured by the entry of the two German states into the United Nations. Those who have lived through the strife of the post-war years can take heart. We learn from the past. For only with such a perspective can we grasp the full meaning of this solemn moment. But I would suggest that the larger meaning is found not by looking behind but by looking ahead. The most serious differences among nations can and must be resolved diplomatically. There is no other way short of catastrophy. Ideological differences remain and are immense. But here in the United Nations the principles of universality and cooperation are and must be demonstrated once more for all to see. Is it too much to hope that today will also mark the beginning of a new realism for this body as it goes about its noble task on behalf of the peoples of all the world? As I welcome the two German states on behalf of the United States, I express this fervent hope, may peace,may justice be with us all.

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